

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-213886

DATE: October 2, 1984

MATTER OF: Thomas A. Donohue, et al. - Overtime Compensation for 12-hour Irregular Shifts -
"Two-Thirds Rule"

DIGEST:

The "two-thirds rule" permits an agency to compensate employees under 5 U.S.C. § 5542(a) for only 16 hours of a 24-hour tour of duty which includes substantial time in standby status, based on a presumption that the remaining 8 hours represent sleep and mealtime. However, this presumption, and hence the two-thirds rule, does not apply to shifts of less than 24 hours. Therefore, Federal firefighters who work an irregular or occasional overtime shift of 12 hours cannot be paid less than 12 hours of overtime compensation based on the two-thirds rule. However, bona fide meal periods may be excluded from compensable overtime hours.

Mr. Conrad R. Hoffman, Controller, Veterans Administration (VA) has forwarded for settlement claims submitted by Mr. Guy Colletti, National Representative for the American Federation of Government Employees. The claims are by five firefighters at the VA Medical and Regional Office Center, White River Junction, Vermont (VA Center). The firefighters request a decision on whether the so-called "two-thirds rule" can be used to determine the number of compensable hours of work under section 5542(a), title 5, United States Code, for irregular overtime duty periods of less than 24 hours, specifically 12-hour shifts in this case.

We conclude that use of the two-thirds rule for irregular overtime shifts of less than 24 hours is improper. The rule presumes the exclusion of sleep and mealtime from a shift of 24 hours or more; however, this presumption is not reasonable for shifts of less than 24 hours. Therefore, we return the claims for reexamination and calculation by the VA of overtime pay under 5 U.S.C. §§ 5542(a) (1982) for the 12-hour overtime shifts at issue.

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BACKGROUND

Firefighters at the VA Center are regularly scheduled for a 60-hour workweek consisting of two 24-hour tours and one 12-hour tour. For this extended tour of duty, which includes substantial time in "standby" status, the firefighters receive their basic rate of pay and premium pay on an annual basis for the regularly scheduled standby duty as authorized by 5 U.S.C. § 5545(c)(1) (1982).^{1/} Sometimes the firefighters work an additional 12-hour irregular or occasional overtime shift outside of their regularly scheduled workweek. At issue is the application of the "two-thirds rule" to this shift.

The "two-thirds rule" was approved by our Office in 25 Comp. Gen. 161 (1945) for use with respect to 24-hour standby shifts of firefighters compensated under the Federal Employees Pay Act of 1945, Pub. L. 79-106, § 201, 39 Stat. 296, which is now codified, as amended, at 5 U.S.C. § 5542(a) (1982). This rule also has been recognized and applied for many years by the Office of Personnel Management (OPM) and the courts. See, e.g., Federal Personnel Manual Supp. No. 990-2, bk. 610, SI-3d (Inst. 59, Aug. 18, 1978), discussed hereafter; Collins v. United States, 141 Ct. Cl. 569 (1958). Under the rule, 16 hours of a 24-hour shift involving substantial standby duty represent time in a pay status, and 8 hours of the 24-hour shift are excluded from the calculation of hours worked as time out of pay status for sleeping and eating.

The VA has applied the two-thirds rule to the firefighters' 12-hour irregular overtime shifts which were in addition to their regularly scheduled workweek, thus excluding 4 hours from the overtime compensation payable for each shift on the basis that the employees were not in pay status during this 4 hours. According to VA, use of the two-thirds rule here is based on the fact that the

^{1/} Office of Personnel Management regulations also address annual premium pay for employees required regularly to stay at, or within the confines of, their stations for longer than ordinary periods of duty which include a substantial time in "standby" status. 5 C.F.R. § 550.141 (1984). The regulations define "standby" status as those periods when the employee "is not required to perform actual work and is free to eat, sleep, read, listen to the radio, or engage in other similar pursuits." Id., § 550.143(e).

12-hour shift includes an element of standby duty. However, the firefighters contend that applying the rule to shifts of less than 24 hours is inconsistent with Comptroller General decisions and OPM regulations.

The issue of compensation for the VA firefighters who work these irregular 12-hour overtime shifts surfaced as a Fair Labor Standards Act (FLSA) complaint filed at the VA Center.^{2/} In response to that complaint, OPM in a letter dated January 20, 1983, concluded that VA was not in violation of the FLSA with respect to its compensation practices at the Center because VA was not excluding sleep and mealtime from FLSA hours worked for employees engaged in fire protection for duty periods of 24 hours or less. See 5 C.F.R. § 551.432 (1984); Beebe v. United States, 640 F.2d 1283 (Ct. Cl. 1981). However, in the same letter OPM advised VA that, under title 5, United States Code, its policy of applying the two-thirds rule to irregular overtime shift periods of less than 24 hours was inconsistent with OPM policy as expressed in FPM Supp. No. 990-2, bk. 610, S1-3d, supra, and by OPM's Office of Pay and Benefits Policy in its advisory opinion dated January 26, 1982.

The OPM letter acknowledged that VA's planned changes in scheduling the regular workweek for firefighters would eliminate irregular 12-hour tours and, therefore, make the issue of the two-thirds rule academic in the future. However, OPM suggested that the firefighters might pursue with our Office their existing claims for additional compensation under title 5.^{3/}

^{2/} Federal employees engaged in fire protection activities may be entitled to compensation for overtime work under either 5 U.S.C. § 5542 or the FLSA, 29 U.S.C. § 201 et seq. If an employee is entitled to compensation under both laws, that employee receives compensation under whichever law provides the greater overtime benefit. See, e.g., 54 Comp. Gen. 371 (1974). Payment for irregular overtime periods of less than 24 hours will generally result in greater benefits if calculated under the provisions of 5 U.S.C. § 5542.

^{3/} It is not clear from the record before us whether VA implemented its plan to eliminate 12-hour tours following receipt of OPM's letter.

OPINION

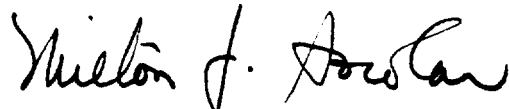
While the VA Center firefighters receive annual premium pay for their regularly scheduled standby duty under 5 U.S.C. § 5545(c)(1), the additional irregular 12-hour tours here in question are compensable at overtime rates in accordance with 5 U.S.C. § 5542. See Federal Personnel Manual Letter No. 551-5, January 15, 1975, Attachment 3(A) and (B); see also 5 C.F.R. § 550.163 (1984). As indicated above, OPM guidance provides no basis for excluding sleeping and mealtime from compensable hours worked in a shift of less than 24 hours. In this regard, OPM's advisory opinion to VA of January 26, 1982, observes:

"* * * the application of the 'two-thirds' rule for determining compensable hours of work for a tour of duty of less than 24 hours is inappropriate. The 'two-thirds' presumes the exclusion of sleep and meal time from a tour of duty of 24 hours. To meet this presumption it has been the interpretation of this office that the employee must be on a tour of duty of 24 hours or more. Thus, it has been the policy of this office that the 'two-thirds' rule is appropriate for tours of duty of 24 hours and that it is administered in increments of 24 hours for periods of service of more than 24 hours (e.g., 48 hours, 72 hours). Of course, the agency may deduct any bona fide meal periods during a period of service of less than 24 hours to determine compensable hours of work under 5 U.S.C. 5542."

We agree with OPM's interpretation and application of the two-thirds rule in this context. Our approval of the two-thirds rule in 25 Comp. Gen. 161 was premised on its application to a 24-hour shift. In a shift of such a duration, it is reasonable to presume that a portion of the employee's time will be spent sleeping and eating. We approved the two-thirds rule as a convenient method for computing hours of employment in consideration of that presumption. By contrast, in an irregular overtime shift of 12 hours, which is akin to a long workday, it is not

reasonable to presume that a portion of the employee's time will be spent sleeping. However, it is reasonable to expect that a portion of the employee's time will be spent eating in a 12-hour irregular shift; thus, bona fide meal periods may be deducted from a 12-hour irregular overtime shift to determine compensable hours of work.

In accordance with the foregoing, the two-thirds rule does not apply to irregular or occasional shift periods of less than 24 hours in determining compensable hours of overtime work under 5 U.S.C. § 5542. However, bona fide mealtimes may be deducted to determine compensable hours of overtime. Therefore, we return the claims to VA for reexamination and calculation of overtime pay under 5 U.S.C. § 5542 for the 12-hour irregular or occasional shifts, to assure that the firefighters receive all payments which they are entitled.

for 
Comptroller General
of the United States